

THE MOST INCOMPETENT BRANCH

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INTRODUCTION

Judges are not legislators.

This is such a trite observation that it is practically a cliché—an insult hurled against judges that supposedly sin against their office by “legislating from the bench.”¹ Nevertheless, our instinct to recoil from judges who confuse their role with that of elected officials is a healthy one in a democracy. Legislators rightly enjoy broad discretion to make policy because they were chosen as the people’s representatives and are accountable to their voters in the next election. Judges, meanwhile, enjoy no such mandate. They are, with their distance from democracy and their lifetime appointments, the closest thing the United States has to a governing nobility.

While an elected official’s legitimacy flows from the will of the people, a judge’s legitimacy flows from a written text. “It is emphatically the province and duty of the judicial department to say what the law is,”² not to bring new laws into being. A judge who divorces their opinions from a controlling text strays far afield from their constitutional role.

Yet, while few doubt that Article I describes an entirely different branch of government than Article III, the reality is that distinguishing the legislative role from the judicial is actually far more difficult than pithy broadsides against judges who “legislate from the bench” suggest.

Our Constitution is simply riddled with phrases that offer judges little, if any, guidance on how it should be applied to individual cases. What are the “privileges or immunities of citizens of the United States”?³ What makes a search or seizure “unreasonable”?⁴ Which punishments are “cruel and unusual”?⁵ If the government wants to deny someone “liberty,” how

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¹ See, e.g., George W. Bush, Remarks Announcing Nominations for the Federal Judiciary, 1 PUB. PAPERS 504 (May 9, 2001) (“Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench.”); Michael Tomasky, *Michael Tomasky on the GOP’s Hypocrisy About Activist Judges*, DAILY BEAST (Mar. 21, 2012), <http://www.thedailybeast.com/articles/2012/03/21/michael-tomasky-on-the-gop-s-hypocrisy-about-activist-judges.html> (arguing that conservatives are the real legislators from the bench).

² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

³ U.S. CONST. amend. XIV, § 1.

⁴ *Id.* amend. IV.

⁵ *Id.* amend. VIII.

much “process” is “due”?⁶ (And, by the way, does that process need to come from lawmakers, an adjudicative body, or both?) What is a “public use” of private property?⁷ How should the United States guarantee a “republican form of government”?⁸ What is the “general welfare of the United States”?⁹ Which laws are “necessary and proper” for carrying into effect Congress’s enumerated powers?¹⁰

The danger of a Constitution written at such a high level of vagueness is that it places few limits on the behavior of judges. There are so many permissible meanings of words such as “reasonable,” “privileges,” or “liberty” that judges can treat them as a kind of buffet, selecting entirely plausible interpretations that achieve desired results.

Distinguishing between the power of judges and the power of legislators, as it turns out, is more difficult than it may first appear. Nevertheless, the stakes in this game are very high, because any power claimed by the unelected branch of government must necessarily be taken from the two branches that are actually responsive to the people. If Americans believe that the right to govern flows from the will of the people, then any viable theory of the role of the judiciary must place strict limits on judges’ power to interpret broad and open-ended constitutional passages. Part I of this Essay evaluates Mr. Evan Bernick’s proposed “right to earn a living,” and concludes that his argument in favor of such a rule fails to cabin judicial discretion.

Part II explores what happens when judges are not bound by adequate limits. As it turns out, this is a very easy task, as it has happened before. We call the theory that judges can read their will into the Constitution “*Lochnerism*.” *Lochner v. New York*¹¹ and the *Lochner* line of cases, as Part II explains, demonstrate that courts are simply not competent to handle the kind of freewheeling power to censor laws that the Supreme Court claimed in the *Lochner* Era and that Bernick’s proposal would restore to them.

I. THE RIGHT THAT WASN’T

Mr. Bernick offers no textual analysis explaining why the words “nor shall any state deprive any person of life, liberty, or property, without due process of law”¹² must be read to create the “right to earn a living” that he desires. Instead, he grounds this proposed right in judicial precedent, claim-

⁶ *Id.* amend. V; *id.* amend. XIV, § 1.

⁷ *Id.* amend. V.

⁸ *Id.* art. IV, § 4.

⁹ U.S. CONST. art. I, § 8, cl. 1.

¹⁰ *Id.* art. I, § 8, cl. 18.

¹¹ 198 U.S. 45 (1905).

¹² U.S. CONST. amend. XIV, § 1.

ing that “the Supreme Court has consistently affirmed that the Constitution protects Americans’ right to choose and pursue a lawful calling.”¹³

If this were true, then Mr. Bernick could at least claim that his proposed right should be recognized under a method of determining unenumerated rights that past Supreme Court decisions deemed legitimate. The Court has, at times, said that the Fourteenth Amendment protects against violations of a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁴

Yet, any suggestion that judicial enforcement of Bernick’s proposed right fits within our constitutional traditions runs headlong into a very basic problem. The citations Mr. Bernick offers in support of his so-called “right to earn a living” do not support his asserted claims—it is simply not true, as Mr. Bernick suggests, that the Supreme Court has consistently affirmed the kind of right he is proposing. While there is one very famous case that does support Bernick’s argument—*Lochner v. New York*—that case, of course, was long ago overruled.¹⁵

A. *A Problem of Citechecking*

Though Mr. Bernick cites a bevy of cases in support of his proposition that a “right to earn a living” is firmly rooted in Supreme Court precedent, nearly half of these cases precede the Court’s 1937 decision overruling *Lochner*.¹⁶ As such, any references to a right similar to the one Mr. Bernick proposes in these early cases can be dismissed as relics of an era when the Supreme Court viewed its appropriate role in cases challenging workplace regulations very differently.

Of the remaining cases, one involves a plaintiff who was denied a license to practice law largely because he engaged in First Amendment-protected activity.¹⁷ Another is a procedural—not a substantive—due pro-

¹³ Evan Bernick, *Towards a Consistent Economic Liberty Jurisprudence*, 23 GEO. MASON L. REV. 479, 479 (2016).

¹⁴ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964)) (internal quotation marks omitted).

¹⁵ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392-93 (1937) (“This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable.” (footnote omitted)).

¹⁶ Bernick, *supra* note 13, at 479 n.1, 482 nn.12-15 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Dent v. W. Virginia*, 129 U.S. 114 (1889)). Significantly, *Meyer* lumps the so-called right “to engage in any of the common occupations of life” in with *Lochner*’s discredited “right of the individual to contract.” 262 U.S. at 399.

¹⁷ *Schware v. Bd. of Bar Exam’rs*, 353 U.S. 232, 238-46 (1957). In addition to noting that the plaintiff in this case was punished for his unpopular political activities and for actions he took to continue working despite being a victim of anti-Semitism, *Schware* also can be read to stand for the constitutional proposition that one cannot be criminally punished if they are not convicted of a crime. *Id.*

cess case involving a man who was stripped of his security clearances without adequate procedural safeguards.¹⁸ A third involves invidious discrimination on the basis of alienage.¹⁹ None of the cases that Mr. Bernick cites applies the so-called right to earn a living to block government action that doesn't violate some explicit textual provision of the Constitution. So even if the Court does occasionally pay lip service to this supposed right, post-*Lochner*-Era cases do not suggest that it has much independent force absent some other textual hook.

The most recent case Mr. Bernick cites in support of a "generalized due process right to choose one's field of private employment," *Conn v. Gabbert*,²⁰ fits this pattern of occasionally mentioning the right without actually putting any real force behind it. Though Chief Justice William Rehnquist's 1999 opinion in *Gabbert* does mention such a "generalized due process right," these words appear in a highly dismissive paragraph explaining that existing case law provides only "scant metaphysical support" for the claim asserted in that case.²¹ One line of curt text hardly constitutes a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The dog that does not bark in Bernick's essay, however, is the fact that there is another case that directly supports Bernick's proposed right. Though *Lochner* does not use the exact words "right to earn a living," it does refer to a synonymous "right of the individual . . . to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family," and it warns that, unless this so-called right is protected, "no mode of earning one's living could escape" the power of governing majorities.²²

It is obvious why Mr. Bernick would not wish to acknowledge these parallels in an essay arguing that "the Supreme Court has consistently affirmed" that the right to earn a living is protected by the Constitution, because once one notices that the so-called "right to earn a living" is the same right that the Court applied in *Lochner*, Bernick's thesis is left in shambles. *Lochner* is an anti-precedent, overruled nearly eighty years ago. Just last term, three members of the Court's *conservative* bloc denounced "the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*."²³ Short of *Dred Scott v. Sand-*

¹⁸ *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

¹⁹ *Examining Bd. of Eng'rs v. Otero*, 426 U.S. 572, 604 (1976).

²⁰ *Conn v. Gabbert*, 526 U.S. 286 (1999).

²¹ *Id.* at 291-92.

²² *Lochner v. New York*, 198 U.S. 45, 56, 59 (1905).

²³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (2015) (Roberts, C.J., joined by Scalia, J. & Thomas, J., dissenting).

*ford*²⁴ or *Plessy v. Ferguson*,²⁵ there is literally no decision in American history that is less rooted in accepted legal traditions than *Lochner*.

B. *Failed Revision*

A few words should be said about the revisionist scholarship arguing that the maximum hours law at issue in *Lochner* “was probably a rent-seeking, competition-reducing measure supported by labor unions and large bakeries for the purpose of driving small bakers and their large immigrant workforce out of business.”²⁶

There is no scholarly consensus around this revisionist viewpoint. Indeed, as Professor Paul Kens explains, the revisionist claim that the law at issue in *Lochner* “was the product of a conspiracy between large bakeries and labor unions to put small bakeries out of business” is “not based on primary sources.”²⁷ To the contrary, “[n]either the newspapers of the time, nor personal accounts, nor legislative journals indicate that any large or powerful business was involved in passing this legislation.”²⁸

Even more significantly, there’s no indication in the *Lochner* opinion itself that the Court believed it was acting to shut down some sort of rent-seeking conspiracy between unions and large bakeries.²⁹ There was some pre-*Lochner* precedent expressing skepticism towards “class legislation”—that is, legislation that grants special benefits or imposes special burdens on a particular class of individuals—and a dissenting judge in the Court of Appeals of New York did raise this issue before the case reached the justic-

²⁴ 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

²⁵ 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁶ Bernick, *supra* note 13, at 502 (quoting *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 287 (2d Cir. 2015), *cert. denied*, No. 15-507, 2016 WL 763255 (U.S. Feb. 29, 2016)) (internal quotation marks omitted).

²⁷ Paul Kens, *Lochner v. New York: Tradition or Change in Constitutional Law*, 1 N.Y.U. J.L. & LIBERTY 404, 409 (2005).

²⁸ *Id.*

²⁹ Though the *Lochner* opinion does refer to a “a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare,” *Lochner v. New York*, 198 U.S. 45, 63 (1905), it later states that the particular “suspicion” that concerned the justices in the majority was that New York was seeking to regulate labor and not health. *See id.* at 64 (claiming that “it is apparent that the public health or welfare bears but the most remote relation to the law” and that “[i]t seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees”). There is no indication in the opinion that the Court acted because of a concern about the kind of rent-seeking conspiracy suggested by revisionist scholars.

es.³⁰ The Supreme Court, however, rooted its decision on an entirely separate right to contract.

Had the *Lochner* Court sought to shut down a rent-seeking conspiracy, one would expect the *Lochner* opinion to at least mention such a conspiracy in its opinion. One would also expect an opinion concerned primarily with collusion between unions and large businesses to be much narrower than the *Lochner* opinion. Instead, *Lochner* speaks in sweeping terms about a “general right to make a contract in relation to [a] business.”³¹

Indeed, if *Lochner* were merely an attack on a particular rent-seeking conspiracy, one would expect its impact to be limited to the case’s facts. Yet subsequent decisions citing *Lochner* invalidated laws protecting workers’ right to organize³² and providing for a minimum wage.³³ Both of these cases also asserted that a broad right to contract exists without limiting application of that right to cases involving some sort of legislative conspiracy.

It is also worth noting that, had *Lochnerism* remained good law into the mid-twentieth century, then it is likely that much of the nation’s civil rights framework would have also been invalidated. The Court’s right to contract decision in *Adair v. United States*,³⁴ the anti-union decision, prevented the government from compelling “any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another.”³⁵ Under this rule, the Civil Rights Act of 1964, with its ban on employment discrimination and its requirement that lunch counters serve African-American customers, would have been declared unconstitutional.

So the evidence supporting the revisionist narrative regarding the passage of the law at issue in *Lochner* is uncertain, at best. The *Lochner* opinion gave no indication that the Court was concerned with legislative collusion, and it handed down a broad rule that was applied with sweeping effect in future cases. Whatever might have motivated New York’s legislature to pass a law limiting the number of hours worked by bakers, those motives cannot justify the far-reaching decision handed down in *Lochner*.

³⁰ *People v. Lochner*, 69 N.E. 373, 386 (N.Y. 1904) (O’Brien, J., dissenting) (“Class legislation of this character, which discriminates in favor of one person and against another, is forbidden by the Constitution of the United States . . .”).

³¹ 198 U.S. at 53.

³² *Adair v. United States*, 208 U.S. 161, 173, 175 (1908), *overruled in part by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

³³ *Adkins v. Children’s Hosp.*, 261 U.S. 525, 545 (1923), *overruled in part by W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

³⁴ 208 U.S. 161 (1908), *overruled in part by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

³⁵ *Id.* at 174.

II. THE DARK AGES

Lochner, and its notion of a “right of contract between the employer and employes [sic],”³⁶ did not emerge from a vacuum. Rather, it established at the federal level a rule similar to the rules handed down in similar state court decisions preventing worker-protective legislation. These decisions were often explicit about the ideological preferences of the judges who wrote them, and they built upon scholarship that was even more explicit—at times openly rejecting the notion that judges should be bound by the text of the Constitution at all.

Yet, while *Lochner* is consistent with a line of cases and scholarship advocating for strict limits on labor laws, it was also born into an era marked as much by arbitrariness as it was by ideology. *Lochner* and similar cases were selectively applied by justices who also felt comfortable treating explicit passages of the Constitution as if they were virtual nullities. In the *Lochner* Era, the judiciary maximized its own power, and it demonstrated that it could not be trusted with the power that it seized.

A. “*The Absolutism of a Democratic Majority*”

In the years surrounding *Lochner*, judges were generally hostile to claims brought by workers against employers, even in fairly rudimentary tort cases. A 1910 study of workplace fatalities found that over half of widows and children left behind after a fatal accident either received nothing from their deceased loved one’s employer or else they only received enough money to pay for a funeral.³⁷ Of the remaining families, just a small fraction received more than what the lowest paid worker earned in a year.³⁸

Meanwhile, state supreme courts frequently struck down worker-protective laws, often casting their opposition to the law in ideological terms. Thus, a law shielding Wisconsin workers’ right to organize was “legalized thralldom, not liberty.”³⁹ A law ensuring that Ohio coal miners would be paid for all of the coal that they mined was an “object of socialism.”⁴⁰ A Missouri statute prohibiting employers from paying workers in scrip redeemable only at the company store “introduce[d] a system of state paternalism which is at war with the fundamental principles of our government.”⁴¹

³⁶ *Lochner*, 198 U.S. at 53.

³⁷ CRYSTAL EASTMAN, WORK-ACCIDENTS AND THE LAW 120-22 (1910).

³⁸ *Id.*

³⁹ *State ex rel. Zillmer v. Kreuzberg*, 90 N.W. 1098, 1104 (Wis. 1902).

⁴⁰ *In re Preston*, 59 N.E. 101, 102 (Ohio 1900).

⁴¹ *State v. Loomis*, 22 S.W. 350, 353 (Mo. 1893).

The Wisconsin Supreme Court's opinion in *State ex rel. Zillmer v. Kreutzberg*⁴² was typical of this line of cases. Anticipating later U.S. Supreme Court decisions holding that yellow-dog contracts—contracts that prohibit workers from joining a union as a condition of their employment—are protected by the Constitution,⁴³ *Zillmer* struck down a similar Wisconsin law protecting workers from being terminated because of their membership in a union.⁴⁴

In an homage to the Declaration of Independence, the early twentieth-century Wisconsin Constitution stated that “all men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”⁴⁵ *Zillmer* reasoned that this vague statement on all men's “liberty” protects “[f]ree will in making private contracts, and even in greater degree in refusing to make them,” and thus an employer may refuse to contract with any worker who refuses to quit their union.⁴⁶

To bridge this gap, Wisconsin's justices looked to some of the leading conservative thinkers of the Nineteenth Century, including the same “Mr. Herbert Spencer's *Social Statics*” that Justice Oliver Wendell Holmes dismissively cites in his *Lochner* dissent.⁴⁷ *Social Statics* was a popular text in the decades following the Civil War which argued that “those of lowest development” should be allowed to simply die. “Inconvenience, suffering, and death, are the penalties attached by nature to ignorance, as well as to incompetence,” Spencer wrote, adding that nature should be allowed to “purify society from those who are, *in some respect or other*, essentially faulty.”⁴⁸ If a man or woman is “sufficiently complete to live” than they should live, Spencer believed, but if “they are not sufficiently complete to live, they die, and it is best they should die.”⁴⁹

Zillmer relied much more heavily, however, on the American scholar Christopher Tiedeman than it did on the British Spencer. Indeed, the court's opinion lifted a definition of liberty directly from Tiedeman's writings—“Every man has a natural right to hire his services to any one he pleases, or refrain from such hiring; and so, likewise, it is the right of every one to de-

⁴² 90 N.W. 1098 (Wis. 1902).

⁴³ See, e.g., *Adair v. United States*, 208 U.S. 161, 173-75 (1908).

⁴⁴ 90 N.W. at 1098-99, 1105.

⁴⁵ *Id.* at 1099 (quoting WIS. CONST. art. I, § 1) (internal quotation marks omitted).

⁴⁶ *Id.* at 1102, 1105.

⁴⁷ *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting); *Zillmer*, 90 N.W. at 1101.

⁴⁸ HERBERT SPENCER, *SOCIAL STATICS; OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED* 412, 415 (New York, D. Appleton & Co. 1883).

⁴⁹ *Id.* at 415.

termine whose services he will hire. . . . Governments, therefore, cannot exert any restraint upon the actions of the parties.”⁵⁰

Professor Tiedeman, who wrote lengthy treatises claiming that there are strict limits on the state’s police power, was arguably the most influential scholar of his era that did not actually sit on a court. Certainly, Tiedeman believed himself to be one of the great legal voices of his generation. In the second edition to one of his treatises, he bragged that “the first edition of the book has been quoted by the courts with approval in hundreds of cases.”⁵¹

Yet, while Tiedeman provided much of the intellectual basis for proto-*Lochnerian* decisions such as *Zillmer*, the professor could occasionally be quite candid about his loose approach to legal texts. “[T]he conservative classes,” he wrote in one volume, “stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man,—the absolutism of a democratic majority.”⁵² To combat this fear, Tiedeman urged judges to “lay their interdict upon all legislative acts” that violated his conception of liberty—“even though these acts do not violate any specific or special provision of the Constitution”—and protect the “conservative classes” by reading the vaguest provisions of the Constitution expansively.⁵³

B. *The Judicial Veto*

In fairness, not every member of the *Lochner* majority was inspired by a Tiedeman-like desire to protect “the conservative classes,” although Justice Rufus Peckham, who authored the Court’s decision in *Lochner*, was practically a caricature of such a judge.

As a member of New York’s highest court, Peckham dissented from a decision upholding a ban on race discrimination in “places of amusement”—the plaintiffs in this case claimed that such a law interfered with their right to do with their own property as they chose.⁵⁴ In another case, when a fourteen-year-old girl employed by a laundry crushed her hand between the heavy rollers of a machine used to press collars, Peckham scoffed at the idea that her employer was obligated to prevent such accidents or to compensate their employee. By merely “accepting this work, and entering upon the employment about this machine,” Peckham claimed, the young

⁵⁰ *Zillmer*, 90 N.W. at 1100 (quoting 2 CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT § 204, at 939 (2d ed. 1900) [hereinafter TIEDEMAN, TREATISE]).

⁵¹ 1 TIEDEMAN, TREATISE, *supra* note 50, at ix.

⁵² CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 80 (New York, G.P. Putnam’s Sons 1890).

⁵³ *See id.* at 81.

⁵⁴ *People v. King*, 18 N.E. 245, 245-46 (N.Y. 1888).

girl assumed the risk that she may be injured by it.⁵⁵ Workers like this permanently disabled girl, he wrote, “cannot call upon the defendant to make alterations to secure greater safety.”⁵⁶

Yet, while Peckham was the ideal justice to take up Tiedeman’s mantle, many of the lawyers and judges of this era were animated by a distinct kind of conservatism. As Alexis de Tocqueville observed, lawyers “are secretly opposed to the instincts of democracy; their superstitious respect for what is old, to its love of novelty; their narrow views, to its grandiose plans; their taste for formality, to its scorn for rules; their habit of proceeding slowly, to its impetuosity.”⁵⁷

This fear that democracy can change too much, too quickly animated much of the profession for decades after de Tocqueville published his famous commentary on the United States. James Broadhead, the first president of the American Bar Association (“ABA”), compared the proper evolution of the law to the slow, Darwinian process of natural selection in 1879.⁵⁸ Twenty years later, ABA president Charles Manderson built on this theme, emphasizing that “[n]ature, in her evolutionary processes, moves with a deliberation only equaled by her precision. Her motto seems to be, ‘make haste slowly.’”⁵⁹ New Jersey Governor John Griggs, a future United States Attorney General, praised the common law’s development

from the earliest beginnings, from the proto-plasmic cells, so to speak, of village and tribal customs among the primeval fens and forests of Saxony, or the bogs and crags of Jutland, on through centuries of progressive evolution upon English soil and under English skies until we see its mature development.⁶⁰

Such gradual development, Griggs claimed, “is an employment well calculated to arouse the admiration and enthusiasm of the lawyer and statesman as well as of the mere student of history.”⁶¹

⁵⁵ Hickey v. Taaffe, 12 N.E. 286, 289 (N.Y. 1887).

⁵⁶ *Id.*

⁵⁷ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 313 (Gerald E. Bevan trans., Penguin Books 2003).

⁵⁸ IAN MILLHISER, INJUSTICES: THE SUPREME COURT’S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICITING THE AFFLICTED 100-01 (2015).

⁵⁹ Charles F. Manderson, *The President’s Address*, 22 ANN. REP. A.B.A. 219, 228 (1899) (equating the slow development of international law at the Hague with the inevitable delay of an international peace); accord MILLHISER, *supra* note 58, at 101 (quoting John Austin Matzko, *The Early Years of the American Bar Association, 1878-1928*, at 194 (Aug. 1984) (unpublished Ph.D. dissertation, University of Virginia) (ProQuest Dissertation Express Pub. No. 8515522)).

⁶⁰ John W. Griggs, *The Annual Address: Lawmaking*, 20 ANN. REP. A.B.A. 257, 267 (1897); accord MILLHISER, *supra* note 58, at 101 (quoting Matzko, *supra* note 59, at 193-94).

⁶¹ Griggs, *supra* note 60, at 267; accord MILLHISER, *supra* note 58, at 101 (quoting Matzko, *supra* note 59, at 194).

For legal elites who believed that the law must grow and mature slowly over the course of many centuries, legislatures—with their power to cast aside the common law and replace it with an entirely novel legal regime—were terrifying. One early ABA president warned that the United States could “endure all its other dangers with less apprehension than the action of its federal and state legislation.”⁶² Another fretted that “[w]hen a State legislature meets, every great corporation within its reach prepares for self-defense, knowing by bitter experience how hospitably attacks upon its property are received in committees and on the floor.”⁶³ Other ABA speakers labeled elected lawmakers “reckless politicians who truckled for ‘the unthinking vote’; ‘social agitators’ who sought office for ‘self advantage, not for the public weal’; [and] ‘professional demagogues’ who filled the land with ‘ill-considered and impractical theories’ and engaged in ‘gross, persistent, flagrant and sometimes corrupt dereliction.’”⁶⁴

Conditions were ripe, in other words, for a decision like *Lochner* at the beginning of the twentieth century. Even among jurists who were not committed to the “particular economic theory”⁶⁵ advanced by the *Lochner* decision, there was a strong thread of skepticism towards democracy itself woven into the elite reaches of the legal profession. And the Supreme Court, almost by definition, is made up entirely of the most elite members of this profession.

C. *Incompetence*

It would be a mistake, however, to label *Lochner* a principled opinion. The *Lochner* Court turned a blind eye to workplace conditions that gave the lie to their naive view of workplace bargaining, and the justices of this era applied their own rules haphazardly.

Lochner relied on a distinction between laws regulating the employer/employee relationship directly, which the Court viewed as impermissible barring extraordinary circumstances, and laws that the Court’s majority viewed as protective of “the safety, the morals, [or] the welfare of the public,” which were deemed more permissible. Laws protecting the bakery workers at issue in *Lochner* from simple mistreatment in the workplace, Peckham reasoned, were unnecessary because

⁶² Edward J. Phelps, *Address of the President*, 4 ANN. REP. A.B.A. 141, 172 (1881).

⁶³ Moorfield Storey, *The Annual Address: The American Legislature*, 17 ANN. REP. A.B.A. 245, 249-50 (1894).

⁶⁴ MILLHISER, *supra* note 58, at 101 (quoting Matzko, *supra* note 59, at 208) (internal quotation marks omitted).

⁶⁵ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[t]here [was] no contention that bakers as a class [were] not equal in intelligence and capacity to men in other trades or manual occupations, or that they [were] not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.⁶⁶

Yet Peckham's claim that bakery workers were best left to their own devices if they desired better working conditions would have shocked anyone who actually worked in New York's tenement bakeries. Because bread is a perishable good that needs to be consumed shortly after it is produced, New York's bakeries resisted modernization and consolidation into larger factories. At the beginning of the twentieth century, nearly nine in ten New York bakeries were small operations located in the basement of the same tenements that they served.⁶⁷

The workers in these basement operations labored in conditions that would have made their customers gag on their bread. "[F]ilth, cobwebs and vermin' filled these basements," according to one city inspector's report.⁶⁸ Typically, the tenement's sewer pipes would also run through the bakery, frequently leaking raw contents upon the workers, their workspaces and the dough. In one bakery, "the water closet walls were literally black" with roaches from floor to ceiling.⁶⁹

Often, these basements had no windows and were barely ventilated. So the bakery would fill with flour dust and fumes rising from the oven, which could heat the room into a seeming inferno. Low ceilings forced many workers to crouch. The floors were often just dirt, or they were rotten wood floors riddled with rat holes.⁷⁰

The average bakery employee worked between thirteen and fourteen hours a day, in these conditions, though 126-hour workweeks were hardly unheard of.⁷¹ Yet few bakery workers earned more than twelve dollars a week, or about \$16,000 a year in contemporary, inflation-adjusted dollars.⁷² Typically, these workers were also required to sleep in the bakery on the very tables where they kneaded the dough, and the cost of these sleeping arrangements were deduced from their wages.⁷³

⁶⁶ *Id.* at 57 (majority opinion).

⁶⁷ MILLHISER, *supra* note 58, at 92.

⁶⁸ *Id.* (quoting Denis J. Hanlon, *Inspection of Bake-Shops*, in NINTH ANNUAL CONVENTION OF THE INTERNATIONAL ASSOCIATION OF FACTORY INSPECTORS OF NORTH AMERICA, HELD AT PROVIDENCE, R.I., SEPTEMBER 3-5, 1895, at 12, 16 (Cleveland, Forest City Printing House 1895)).

⁶⁹ *Id.* at 93 (quoting Hanlon, *supra* note 68, at 16) (internal quotation marks omitted).

⁷⁰ *Id.* Admittedly, New York's bakery law did contain other provisions addressing problems such as rotten floor and washroom conditions. *Id.* at 94. Nevertheless, it is significant that it took the "protecting arm of the state" to enact these provisions. When the free market was left to its own devices, it produced sewage-tainted bread and roach-covered water closets.

⁷¹ *Id.* at 93.

⁷² *Id.*

⁷³ MILLHISER, *supra* note 58, at 93.

So these were the conditions that an unregulated workplace offered to bakery workers before the “protecting arm of the state” interfered with that arrangement.

Despite *Lochner*’s holding that health laws may be permissible even if labor laws are profane, Peckham also denied that long hours laboring in a tenement bakery could have a sufficiently adverse impact on health to permit regulation of these hours. In a passage that would have delighted Tiedeman had he not died two years before the *Lochner* decision, Peckham read the professor’s fear of democracy into the Constitution itself— “[i]t is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities?”⁷⁴

Just seven years earlier, however, the Court took a very different view of the role of the law in protecting workers from unhealthy working conditions. In *Holden v. Hardy*,⁷⁵ the Court upheld a Utah law limiting the number of hours worked by miners, admittedly over the dissent of Justice Peckham. Work “beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting,” a majority of the justices reasoned, was sufficiently unhealthful to permit such regulation.⁷⁶ Thus, in the medical opinion of nine lawyers, hot work environments suffused with a “foul atmosphere” were unhealthy when they were located underground, but not when they were in a basement.

The justices showed similar insight into the medical sciences in *Muller v. Oregon*,⁷⁷ decided three years after *Lochner*. A unanimous Court explained that men had “established [their] control [over women] at the outset by superior physical strength.”⁷⁸ Due to inherent differences between the sexes, the Court reasoned, a woman “is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained.”⁷⁹ Thus, limits on the number of hours worked by women were permissible.

This arbitrariness was not limited to the Court’s right-to-contract cases. Beginning in the late nineteenth century, the Court’s Commerce Clause cases began to enforce a distinction between federal regulation of the transit and sale of goods, which Gilded Age justices deemed permissible, and regulation of “manufacture, agriculture, mining, [and] production in all its

⁷⁴ *Lochner v. New York*, 198 U.S. 45, 59 (1905).

⁷⁵ 169 U.S. 366 (1898).

⁷⁶ *Id.* at 396.

⁷⁷ 208 U.S. 412 (1908).

⁷⁸ *Id.* at 421.

⁷⁹ *Id.* at 422.

forms,” which the justices deemed forbidden.⁸⁰ Initially, the Court wielded this distinction to neuter federal antitrust law, ruling that a trust that took control of 98 percent of the nation’s sugar supply was a manufacturing conspiracy and therefore immune from federal regulation.⁸¹ Four years later, however, the Court had a change of heart, holding that a similar conspiracy by pipe manufacturers was actually a conspiracy involving the “sale and transportation” of pipes, and therefore subject to the control of Congress.⁸²

In reality, of course, the companies behind both of these conspiracies were involved in *both* the manufacture and the sale of goods. The decision to label one a conspiracy of manufacturers and the other a conspiracy of traders was entirely arbitrary.

The Court showed similar arbitrariness in its federal labor decisions. In the wake of an historic labor dispute, Congress prohibited railroads from firing workers solely because they belonged to a labor union. As this law applied solely to railroads, which are, by their very nature, engaged in transportation and not manufacturing, it should have been well within Congress’s authority even under the line drawn in previous Commerce Clause cases. Yet the Court struck down this law, declaring that “labor organizations have nothing to do with interstate commerce” even if every single member of the union is engaged in interstate commercial activity.⁸³ Similarly, when Congress protected collective bargaining and similar rights for coal miners, the justices struck down this law on the grounds that mining coal has nothing to do with selling coal.⁸⁴

Yet the Court held different views when management sought help from the “protecting arm of the state.” After a mining executive’s attempt to deunionize one of his mines broke out into an armed conflict, the Supreme Court decided that Congress could regulate mining workers after all when the mining company sought to invoke federal law.⁸⁵

Perhaps the most famous, and the most damning, example of the *Lochner*-Era Court’s willingness to bend its own rules was its anti-canonic decision in *Hammer v. Dagenhardt*.⁸⁶

Operating within the framework that permitted Congress to regulate the transit of goods but not their sale, Congress enacted—and the Supreme Court blessed—various laws prohibiting objects or persons from traveling in interstate commerce. Thus, in *Champion v. Ames*,⁸⁷ the Court upheld a

⁸⁰ *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895).

⁸¹ *Id.* at 9, 16-17.

⁸² *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 240-41 (1899).

⁸³ *Adair v. United States*, 208 U.S. 161, 178 (1908).

⁸⁴ *Carter v. Carter Coal Co.*, 298 U.S. 238, 303-05 (1936).

⁸⁵ *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 310 (1925).

⁸⁶ *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding Congress acted beyond its Commerce Clause authority in attempting to ban child labor), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

⁸⁷ 188 U.S. 321 (1903).

federal law prohibiting interstate transport of lottery tickets.⁸⁸ It followed *Champion* with a pair of unanimous decisions forbidding interstate transit of adulterated foods⁸⁹ and prostitutes.⁹⁰

The Keating-Owen Act of 1916 operated within this framework. Instead of banning child labor outright, it prohibited interstate transit of any good produced in a factory where children under fourteen had recently worked, or where children under sixteen had recently worked more than eight hours a day.⁹¹ Yet, when confronted with this law, the justices simply changed the rules. This ban on child labor, Justice William Rufus Day wrote for the *Hammer* Court, “does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless.”⁹²

This holding had no basis in law. As the Court explained in its very first Commerce Clause case, Congress’s power over interstate commerce—though limited only to matters that legitimately involve commerce among the states—is “plenary” with respect to those matters. Thus, if Congress has the power to regulate transportation of goods across state lines—something pre-*Hammer* precedents emphatically said that it did—then Congress could do so however it chose so long as it did not violate some other provision of the Constitution. In Chief Justice John Marshall’s words, Congress’s authority over interstate commerce is “complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”⁹³ As the Court would later explain, *Hammer* rested upon “a distinction which was novel when made and unsupported by any provision of the Constitution.”⁹⁴

So the *Lochner*-Era Court claimed the power to invent extra-textual doctrines and applied them only selectively. And yet, even as it exercised this power in ways that are now widely regarded as repulsive, it showed remarkable restraint in other contexts. *Buck v. Bell*,⁹⁵ with its proclamation that “[t]hree generations of imbeciles are enough,” was a nearly unanimous decision joined by the leaders of the Court’s progressive and conservative wings alike.⁹⁶ During World War I, when Congress enacted speech restrictions so severe that the mere act of displaying a German flag could be punished by twenty years in prison,⁹⁷ the same Court that found a right to

⁸⁸ *Id.* at 354.

⁸⁹ *Hipolite Egg Co. v. United States*, 220 U.S. 45, 57-58 (1911).

⁹⁰ *Hoke v. United States*, 227 U.S. 308, 320-21 (1913).

⁹¹ *Hammer*, 247 U.S. at 268 n.1

⁹² *Id.* at 271-72.

⁹³ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824).

⁹⁴ *United States v. Darby*, 312 U.S. 100, 116 (1941).

⁹⁵ 274 U.S. 200 (1927) (upholding Virginia law providing for sterilization of “mental defectives”).

⁹⁶ *Id.* at 207.

⁹⁷ MILLHISER, *supra*, note 58, at 120-21.

work long hours in squalid bakeries within the vague words of the Due Process Clause couldn't find a right to free speech within the words "Congress shall make no law . . . abridging the freedom of speech."⁹⁸

The justices of this era—the era when the Court maximized its own power to read expansive meaning into the Constitution's vaguest phrases—demonstrated a kind of omni-incompetence. They invented doubtful "rights" and legal doctrines, applied them only selectively, refused to exercise their self-granted power to censor laws in cases involving truly repugnant government action, and they even waved off rights that the Constitution explicitly protects.

Thus, the justices of the Roosevelt Era, having witnessed the hash their predecessors made of the Constitution, had the good sense to impose safeguards intended to prevent future courts from repeating this history. That is why *Carolene Products* and similar cases held that most laws should come to the Supreme Court with a strong "presumption of constitutionality," while also recognizing that a different rule should apply in narrow contexts such as when an explicit provision of the Constitution is implicated.⁹⁹ The *Lochner* Era proved that Courts could not handle the power seized by justices of that era, and, unlike elected officials—or even appointed officials who serve limited terms—rogue judges cannot simply be removed through the democratic process.

CONCLUSION

Now, however, Mr. Bernick seeks to remove the safeguards developed to prevent a reoccurrence of the *Lochner* Era. His proposal is nothing more than call for the same incompetent judicial policymaking that dominated that era.

Consider *Sensational Smiles, LLC v. Mullen*,¹⁰⁰ the case he offers up as the quintessence of judicial underreach for its broad denunciation of economic substantive due process. In Bernick's account, this is a case about a state dental commission protecting dentists from competition.¹⁰¹ The reality, however, is that the only regulation at issue in *Sensational Smiles* was a requirement that only licensed dentists could shine a specific kind of lamp that aids in the bleaching process at another person's mouth. The dental commission imposed this requirement after it was confronted with evidence that bleaching lamps "can lead to an increased risk of pulpal irritation, tooth sensitivity, and lip burns" and that they may also cause damage to the living

⁹⁸ U.S. CONST. amend 1. For a discussion of the Court's World War I Era First Amendment cases, see MILLHISER, *supra* note 58, at 120-26.

⁹⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁰⁰ 793 F.3d 281 (2d Cir. 2015), *cert. denied*, No. 15-507, 2016 WL 763255 (U.S. Feb. 29, 2016).

¹⁰¹ Bernick, *supra* note 13, at 487-88.

pulp inside a tooth.¹⁰² Perhaps Mr. Bernick is correct that this evidence does not justify requiring someone with actual dental training to be present when such a device is used. But there is no reason to believe that lawyers in black robes will do a better job of assessing the appropriate response to dental risks than policymakers with real expertise in dentistry.

Therein lies the fatal flaw in his proposal. We do not face a choice between our current system of government—with all the risk of interest group capture that democracy unavoidably entails—and rule by enlightened and benevolent leaders who are well-trained for all relevant scientific and economic questions that may come before a government. The choices available are between our current democratic system and rule by men and women with juris doctorates who will necessarily possess little expertise in many policy matters and who, by virtue of their lifetime appointments, are completely unaccountable to the people.

The day is past when we trust unelected lawyers to play doctor. We know, from the *Lochner* Era, what happens when too much power is given to judges. I do not understand why Mr. Bernick would trade a system that serves us so well for one that served our great-grandparents so poorly.¹⁰³

¹⁰² *Sensational Smiles*, 793 F.3d at 284 n.2.

¹⁰³ This formulation was originally stated by Justice O'Connor in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring) ("Why would we trade a system that has served us so well for one that has served others so poorly?").